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Seeking Shelter in Personal Insolvency Law: Recession, Eviction and Bankruptcy's Social Safety Net

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Many legal systems understand consumer insolvency laws as social insurance, providing relief and a "fresh start" to over-indebted households who fall through gaps in the social safety net. Personal insolvency law in England and Wales in practice functions similarly, but in terms of legal principle and policy is ambivalent - sometimes emphasising household debt relief, other times creditor wealth maximisation. This paper assesses, in the context of novel debt problems brought to prominence by recession and austerity, the extent to which the law has embraced personal insolvency's social insurance function. The discussion is framed particularly by the escalating UK housing crisis and the case of Places for People v Sharples *concerning consumer bankruptcy's (non) protection of debtors from eviction. The analysis illustrates how tensions between conceptual understandings and personal insolvency law's practical operation undermine the law's ability to fulfil its potential to produce positive policy responses to contemporary socio-economic challenges.*

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INTRODUCTION

Many legal systems understand consumer insolvency laws as a form of social insurance.[1] The law's discharge of debt provides relief to financially troubled households falling outside the social safety net and so operates as an "insurer of last resort". In England and Wales, personal insolvency law in practice functions similarly, invoked by debtors of little income and few assets to obtain respite from financial difficulty and creditor collection efforts. As a matter of legal principle and policy, however, English law is ambivalent in its acceptance of this view of personal insolvency law. Instead, policymakers, judges and commentators tend to divide the law's theoretical basis between two primary objectives: *debt collection* and the maximisation of returns to creditors, as well as the provision of *debt relief* to over-indebted individuals under the "fresh start" policy. Underpinning the first of these aims is the view that insolvency law should involve "as few dislocations as possible" from pre-bankruptcy market allocations.[2] The fresh start policy, in contrast, understands that "[v]iewed in its proper context… the law of personal insolvency functions as a mechanism of redistribution".[3] Tension exists between these "different and perhaps competing philosophical bases for the one legal process".[4] Since insolvency "legislation contains no hierarchical system of priorities",[5] the appropriate "balance" between the policy concerns is unclear.[6]

This paper argues that contemporary economic conditions present a strong case for rebalancing the law towards the fresh start policy and its social insurance function. The Global Financial Crisis and subsequent Great Recession[7] have spurred scholars and policymakers to recognise

[1] *See e.g.* T. Sullivan et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989) 333; A. Feibelman, 'Defining the Social Insurance Function of Consumer Bankruptcy' (2005) 13 *Am. Bankruptcy Institute Law Rev.* 129; J. Niemi-Kiesilainen, 'Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem' (1999) 37 *Osgoode Hall Law J.* 473; I. Ramsay, 'Models of Consumer Bankruptcy: Implications for Research and Policy' (1997) 20 *J. of Consumer Policy* 269, at 278–282; J. Kilborn, 'Comparative Cause and Effect: Consumer Insolvency and the Eroding Social Safety Net' (2007) 14 *Columbia J. of European Law* 563. This paper refers widely to comparative literature, while acknowledging that relevant differences in credit markets and borrowing practices exist across jurisdictions. The author hopes the paper will be read with this in mind, though without wishing to dampen the potential for comparative learning: *see e.g.* I. Ramsay, 'Comparative Consumer Bankruptcy' (2007) 2007 *University of Illinois Law Rev.* 241; J. Ziegel, *Comparative Consumer Insolvency Regimes: A Canadian Perspective* (2003); J. Spooner, 'Fresh Start or Stalemate? European Consumer Insolvency Law Reform and the Politics of Household Debt' (2013) 21(3) *European Rev. of Private Law* 747. The author notes that some ideas explored in the paper are considered further in J. Spooner, *The Law of Consumer Bankruptcy: A Critical Approach* (Cambridge University Press, forthcoming). The paper frequently uses the terms "bankruptcy" and "insolvency" interchangeably, with the exception of specific references to English law, where the bankruptcy procedure is one of four procedures together forming personal insolvency law (alongside the Individual Voluntary Arrangement, Debt Relief Notice and County Court Administration Order procedures): see e.g. I. Fletcher, *The Law of Insolvency* (4th edn., 2009), part I.

[2] T. Jackson, *The Logic and Limits of Bankruptcy Law* (1986) 253.

[3] I. Fletcher, op. cit. n 1, para 3–002.

[4] P. Shuchman, 'An Attempt at a "Philosophy of Bankruptcy"' (1973) 21 *UCLA Law Rev.* 403, at 414.

[5] D. Milman, 'The Challenge of Modern Bankruptcy Policy: The Judicial Response.', in *Commercial Law & Commercial Practice,* ed. S. Worthington (2003) 396.

[6] C. Hallinan, 'The Fresh Start Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory' (1986) 21 *University of Richmond Law Rev.* 49, at 144.

[7] For a description of the period "popularly termed 'The Great Recession'", see for example Kuttner's account of the post-crisis "prolonged slump": R. Kuttner, 'Foreword' in *After the Great Recession: The Struggle For*

the negative economic consequences of excessive household debt in triggering the crisis and in prolonging subsequent recession.[8] Economists increasingly advocate the merits of household debt relief policies, though often seeing "no economy-wide tools available for large-scale debt restructuring".[9] Personal insolvency is just such a tool, however, and this paper links this post-crisis debate with bankruptcy literature. It highlights the persuasive case for deploying personal insolvency as a social insurance mechanism to address "debt overhang" problems[10] and distribute more efficiently the risks inherent in a debt based economy.

The paper illustrates, however, that the lack of clarity as to how to balance the law's aims tends to obscure the public policy benefits of deploying the law in this manner. It focuses on a stark illustration of this problem in the Court of Appeal decision in *Places for People Homes Ltd. v Sharples.* Here a view of personal insolvency centred on creditor returns led to failure to recognise the law's social policy function just as the need for an "insurer of last resort" is particularly great, in the context of a contemporary UK housing crisis and an environment of recession, austerity and a stretched social safety net. Recent years have seen UK households' debt problems increasingly move from financial products to essential obligations such as central and local government debts, as well as rent arrears difficulties symptomatic of the housing crisis.[11] Perhaps surprisingly, scholars and policymakers have rarely travelled down the income distribution curve to consider these "hidden"[12] debt problems.[13] Existing treatments of consumer bankruptcy have tended to focus, for example, on credit card debt during the boom of the 2000s[14] or the mortgage debt epidemic of the post-crisis crash.[15] Consequently, the law must now construct fresh responses to questions posed by such debts' increasing salience and the contemporary environment's challenge to expand protection to those falling outside the social safety net.

Economic Recovery And Growth, eds. B. Cynamon et al. (2014) xiii. See also A. Turner, *Between Debt and the Devil: Money, Credit, and Fixing Global Finance* (2015) 3.

[8] Turner, id.; P. Bunn and M. Rostom, 'Household Debt and Spending' (2014) Q3 *Bank of England Q. Bulletin*; A. Mian and A. Sufi, *House of Debt* (2014).

[9] G. Vlieghe, 'Debt, Demographics and the Distribution of Income: New Challenges for Monetary Policy' (Public lecture, London School of Economics, 18 January 2016) 3 <http://www.bankofengland.co.uk/publications/Pages/speeches/2016/872.aspx>.

[10] Mian and Sufi, op. cit., n 8, 135–151, 162–165; A. Levitin, 'Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy' (2009) *Wisconsin Law Rev.* 565.

[11] *See e.g.* London Assembly, Economy Committee, *Final Demand: Personal Problem Debt in London* (2015); StepChange Debt Charity, *Council Tax Debts: How to Deal with the Growing Arrears Crisis Tipping Families into Problem Debt* (2015); Money Advice Trust, *Changing Household Budgets* (2014). On austerity or "fiscal consolidation" policies generally, *see* M. Blyth, *Austerity: The History of a Dangerous Idea* (2013); W. Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (2014).

[12] LSE Housing and Communities, *Facing Debt: Economic Resilience in Newham* (2014) 19.

[13] S. Ben-Ishai and S. Schwartz, 'Bankruptcy for the Poor?' (2007) 45 *Osgoode Hall Law J.* 471, at 473–4; S. Ben-Ishai et al., 'The Role of Government as a Creditor of the Disadvantaged' in *Contemporary Issues in Consumer Bankruptcy*, eds. W. Backert et al. (2013) 201.

[14] *See e.g.* I. Ramsay, 'Consumer Credit Society and Consumer Bankruptcy: Reflections on Credit Cards and Bankruptcy in the Informational Economy', in *Consumer Bankruptcy in Global Perspective*, eds. J. Niemi-Kiesiläinen et al. (2003) 17; R. Mann, 'Bankruptcy Reform and the Sweat Box of Credit Card Debt' (2007) *University of Illinois Law Rev.* 375; T. Zywicki, 'An Economic Analysis of the Consumer Bankruptcy Crisis' (2004) 99 *Northwestern University Law Rev.* 1463.

[15] *See e.g.* International Monetary Fund, 'Dealing with Household Debt', *World Economic Outlook 2012* (2012) ch. 3; Bunn and Rostom op. cit., n 8; Levitin op. cit., n 10; J. Taub, *Other People's Houses* (2014).

This paper is an effort to advance this process. It interrogates the public policy aims of personal insolvency law, informed by lessons from the crisis and recession, and applies these ideas to a novel debt category through a case study of the *Sharples* decision.[16] In so doing, the paper adds to longstanding literature on bankruptcy's social insurance function and to current academic enquiries into the "regulatory welfare state"[17] and problems of precarious housing and eviction.[18] The paper argues that a strong policy case exists for titling the balance of personal insolvency law towards the fresh start policy and the law's social insurance role, even in the particular context of protecting debtors from eviction. Such an approach, absent in English law as represented by the *Sharples* case, is necessary to reconcile conceptual understandings of the law with its practical operation, and to allow the law to fulfil its potential in producing positive public policy responses to contemporary socio-economic challenges.

AMBIVALENCE OF AIMS IN PERSONAL INSOLVENCY LAW AND POLICY

Many other jurisdictions recognise well the role of personal insolvency law as part of the social safety net. In contrast to English law,[19] bankruptcy procedures were inaccessible to consumers in many European jurisdictions when a mass problem of household over-indebtedness first arose in the 1980s. This led to governments enacting a series of bespoke consumer debt-adjustment laws,[20] which provided previously unavailable debt relief to troubled households and "were seen as part of the welfare state protection".[21] In France, for example, authors characterise the country's law as "un droit social",[22] and several reforms there formed part of wider legislation targeting social exclusion.[23] A seminal empirical study of the US system found that bankruptcy "must be understood within a broad range of social support systems",[24] and that it is "clear that many lawyers see it just that way".[25] Contemporary US authors now describe "consumer bankruptcy [as] one of the largest social insurance programs", providing more to

[16] This approach responds to calls for recognition of the importance of legal doctrine in household debt studies: K. Anderson, 'The Explosive Global Growth of Personal Insolvency and the Concomitant Birth of the Study of Comparative Consumer Bankruptcy' (2004) 42 *Osgoode Hall Law J.* 661, at 675.

[17] D. Levi-Faur, 'The Welfare State: A Regulatory Perspective' (2014) 92 *Public Administration* 599; H. Haber, 'Regulation as Social Policy: Home Evictions and Repossessions in the Uk and Sweden' (2015) 93 *Public Administration* 806.

[18] *See e.g.* M. Desmond, *Evicted: Poverty and Profit in the American City* (2016).

[19] English law extended bankruptcy to non-traders in 1861: s*ee* An Act to amend the law relating to bankruptcy and insolvency in England, 24 & 25 Vict. C. 134; K. Cork, *Insolvency Law and Practice : Report of the Review Committee* (1982) para.42.

[20] *See e.g.* J. Kilborn, 'Two Decades, Three Key Questions, and Evolving Answers in European Consumer Insolvency Law: Responsibility, Discretion, and Sacrifice', in *Consumer Credit, Debt and Bankruptcy*, eds. J. Niemi et al. (2009) 307.

[21] Niemi-Kiesilainen, op. cit., n 1, 481.

[22] I. Ramsay, 'A Tale of Two Debtors: Responding to the Shock of Over-Indebtedness in France and England – a Story from the Trente Piteuses' (2012) 75 *The Modern Law Rev.* 212, at 234.

[23] Projet de loi d'orientation relative à la lutte contre les exclusions, (Projet de loi n° 1055); Loi no 2003-710 du 1er août 2003 *d'orientation et de programmation pour la ville et la renovation urbaine*.

[24] Sullivan, et al., op. cit., n 1, 333.

[25] T. Sullivan et al., *The Fragile Middle Class: Americans in Debt* (2000) 169.

households than all state unemployment insurance programs combined.[26] Even in nearby Scotland, policymakers appear to conceptualise personal insolvency law in welfare state terms, with recent reforms promising a national "financial health service".[27]

This paper explores the extent to which one can see English personal insolvency law in this manner, particularly as contemporary economic conditions pressurise a shrinking social safety net and challenge the law to act as a social insurer of last resort. In terms of express policy statements, English law appears not to be fully committed to this view of the law. Rather it seems to adhere to a "firmly established tenet of time-worn bankruptcy lore… that the bankruptcy system serves two functions: the protection and payment of creditors; and the provision of shelter and a 'fresh start' to overburdened debtors".[28] After an initial dominance of the debt collection objective,[29] the history of the law's development has involved efforts to seek "an appropriate balance of bankruptcy's collection and debtor rehabilitation goals".[30] The precise calibration of this balance has varied at different historical moments.[31] A landmark in establishing debt relief as "a legitimate independent objective"[32] was bankruptcy law's introduction in 1976 of *automatic* debt discharge on completion of the insolvency process,[33] independent of creditor consent or returns to creditors.[34] This objective was advanced further by the Insolvency Act 1986, which reduced the debtor's waiting period for discharge to just three years.[35] This reform followed a key policy report that recognised the fresh start principle as a basic aim of insolvency law.[36] More recent policy developments have tilted the balance ever further towards this aim, while nonetheless reiterating the importance of debt collection. The Enterprise Act 2002 advanced the fresh start policy[37] by reducing the discharge waiting period to just 12 months.[38] It also replaced the automatic restrictions and disqualifications previously applicable to all bankrupts with a narrower system of sanctions for culpable debtors.[39] Policymakers expressly justified these reforms by reference to the "fresh start" or "second chance" philosophy, arguing that a more lenient debt discharge would facilitate

[26] W. Dobbie and J. Song, 'Debt Relief and Debtor Outcomes: Measuring the Effects of Consumer Bankruptcy Protection' (2015) 105 *Am. Economic Rev.* 1272, at 1272.

[27] D. McKenzie Skene, 'Plus Ça Change, Plus C'est La Même Chose? The Reform of Bankruptcy Law in Scotland' (2015) 3 *Nottingham Insolvency Business Law eJournal* 285, at 292 <https://www4.ntu.ac.uk/nls/document_uploads/174831.pdf>.

[28] Hallinan, op. cit., n 6, at 50. See also E. Warren, 'A Principled Approach to Consumer Bankruptcy' (1997) 71 *Am. Bankruptcy Law J.* 483, at 483; I. Fletcher, 'Bankruptcy Law Reform: The Interim Report of the Cork Committee, and the Department of Trade Green Paper' (1981) 44 *The Modern Law Rev.* 77, at 81.

[29] M. Howard, 'A Theory of Discharge in Consumer Bankruptcy' (1987) 48 *Ohio State Law J.* 1047, at 1049; C. Tabb, 'The Historical Evolution of the Bankruptcy Discharge' (1991) 65 *Am. Bankruptcy Law J.* 325; A. Duncan, 'From Disemberment to Discharge: The Origins of Modern American Bankruptcy Law' (1995) 100 *Commercial Law J.* 191.

[30] Howard, id., at 1082. See also D. Skeel, *Debt's Dominion : A History of Bankruptcy Law in America* (2001) 210.

[31] Skene, op. cit., n 27, at 297.

[32] Hallinan, op. cit., n 6, at 60; English law eliminated the creditor consent condition in 1842 (5 & 6 Vict., c. 122, s.39 (1842)), but reintroduced it in 1869 (32 & 33 Vict., c. 71, s.48 (1869)). It was revoked in 1883 but replaced by a system of limited, conditional and suspended debt discharges: Tabb, op. cit., n 29, at 354.

[33] Insolvency Act 1976 ss 7-8; I. Fletcher, *Law of Bankruptcy* (1978) 308–9.

[34] Duncan, op. cit., n 29, at 199; Tabb, op. cit., n 29, at 337.

[35] Insolvency Act 1986 s.279.

[36] Cork, op. cit., n 19, 192.

[37] *See especially* The Insolvency Service, *Bankruptcy: A Fresh Start* (2000).

[38] Enterprise Act 2002 s.256, substituting Insolvency Act 1986 s.279.

[39] *Id.* s.257, Schd. 20, inserting Insolvency Act 1986, s.281A, Schd. 4A.

entrepreneurship by encouraging business risk-taking.[40] Nonetheless, policymakers emphasised the idea that debtors who "can pay, should pay" as a "key element of our bankruptcy system".[41] Reforms simultaneously enhanced procedures requiring bankrupt debtors to contribute income to creditors for up to three years.[42] Similar balance was evident in proposals by Government agency the Insolvency Service to modernise the Individual Voluntary Arrangement (IVA) insolvency procedure, which recognised both the need "to support the concept of a fresh start" and "to ensure the debtor pays the maximum affordable contribution".[43] The introduction of the Debt Relief Order procedure (DRO) in 2009[44] represented a more complete evolution. As confirmed by the courts, "the purpose of the DRO scheme is unadulterated debt relief",[45] and it involves no contributions to creditors from the debtor's assets/income. Instead, low-income debtors with very few assets owing limited amounts of debt simply obtain initial provisional protection from enforcement for one year, followed by full discharge of all non-excluded debts.[46] Even in proposing this means-tested mechanism, policymakers reiterated "that people who can pay… should do", and indicated that the bankruptcy procedure would ensure debtors of greater means make repayments to creditors.[47] The Insolvency Service's 2014 Call for Evidence further exemplifies this disunity of purpose. It considered concurrently a loosening of the restrictive means-based DRO access conditions (thus expanding debt relief), and amendments to the bankruptcy creditor petition procedure that left unquestioned bankruptcy's status as the "strongest of debt recovery tools".[48]

Policymakers thus continue to view the law as serving simultaneously the aims of maximising returns to creditors and offering debtors a fresh start, while enacting recent reforms that have increasingly recognised the latter objective. The difficulty with this position is that many policy decisions and litigated questions involve a direct choice between these two aims, creating tension and risking the law's failure to achieve one or both objectives. In order to reconcile these aims and to evaluate where the law's priority should lie, it is necessary to interrogate the theoretical underpinnings of each objective. The paper now proceeds to do this, arguing that both lessons from the Great Recession and the contemporary practice of personal insolvency law undermine key assumptions of the debt collection objective, suggesting public policy benefits to tilting the law's balance towards debt relief and embracing its social insurance function.

[40] The Insolvency Service; Department for Trade and Industry, *Productivity and Enterprise: Insolvency - A Second Chance* (2001).

[41] id., para.1.9.

[42] Enterprise Act 2002 s. 260, inserting Insolvency Act 1986 s. 310A.

[43] Insolvency Service, *Improving Individual Voluntary Arrangements* (2005) paras 13, 21. For insight into the IVA procedure, see Adrian Walters, 'Individual Voluntary Arrangements: A "fresh Start" for Salaried Consumer Debtors in England and Wales' (2009) 18 *International Insolvency Rev.* 5.

[44] *See* Tribunals Courts and Enforcement Act 2007 (2007 c. 15), Ch. 5 Part 3, Schds. 18-19; Insolvency Act 1986, Part VIIA, Schds. 4ZA-4ZB; The Insolvency Service, *Relief For The Indebted - An Alternative To Bankruptcy* (2005); Department of Constitutional Affairs, *A Choice Of Paths: Better Options to Manage Over-Indebtedness and Multiple Debt* (2004)

[45] *R (Cooper and Payne) v Secretary of State for Work and Pensions* Court of Appeal, England and Wales [2010] EWCA Civ. 1431, [2011] BPIR 223 [85], per Toulson LJ.

[46] A debtor can be sanctioned and subjected to the suspension of her discharge in the event of misconduct.

[47] The Insolvency Service op. cit. n 44, 22, 3.

[48] Insolvency Service, *Insolvency Proceedings: Debt Relief Orders and the Bankruptcy Petition Limit: Call for Evidence* (2014), Foreword.

1. *Personal Insolvency and Creditor Wealth Maximisation*

Certain commentators describe the "standard justification for bankruptcy"[49] as being to serve the objective of debt collection or maximising returns to creditors. Sharing much with classical contract law theory,[50] this view founds itself on neo-classical economic ideas, which adhere closely to the efficient market hypothesis and see the law's role as supporting the market's production of efficient resource allocation. The law should define property rights,[51] establish ground rules for the free transfer of these rights,[52] and enforce contractual bargains in order to protect market expectations.[53] Bankruptcy law becomes an extension of contract law in its fundamental objective of upholding market bargains to the greatest extent possible. This position is clear in Professor Jackson's "creditors' bargain" model, which scholars regard as the most notable unified theory of bankruptcy law.[54] Here "the basic role of bankruptcy law is to translate relative values of non-bankruptcy entitlements into bankruptcy's collective forum with as few dislocations as possible."[55] In this view, bankruptcy primarily addresses a collective action problem of the "tragedy of the commons", as multiple creditors compete to enforce unilaterally their market entitlements from a single pool of the insolvent debtor's limited resources. Bankruptcy law then provides a solution to which creditors hypothetically would agree, by offering a collective procedure of compulsory cooperation.[56] All creditors benefit from the "bargain" of the law's stay on individual creditor enforcement efforts, centralised acquisition and sharing of information regarding a debtor's assets, and distribution of these assets' liquidated proceeds among creditors on a *pro rata* basis.[57] Thus, the *stay* of enforcement actions or *moratorium*[58] represents the core of the creditors' bargain. It gives bankruptcy law its key *collective* nature, preventing individual advantage-taking[59] and preserving *equality of creditors*. Debt discharge is justified under this perspective only as a means of encouraging debtors to

[49] A. Walters, 'Personal Insolvency Law after the Enterprise Act: An Appraisal' (2005) 5 *J. of Corporate Law Studies* 65, at 69.

[50] See e.g. R. Brownsword, *Contract Law: Themes For The Twenty-First Century* (2nd edn., 2006) 46–47; P. Atiyah, *The Rise And Fall Of Freedom Of Contract* (1979); Michael Trebilcock, *The Limits Of Freedom Of Contract* (Harvard University Press 1997) 9–15

[51] Trebilcock, id., 9–15; M. Stearns and T. Zywicki, *Stearns and Zywicki's Public Choice Concepts and Applications in Law* (2009) 18.

[52] Trebilcock, op. cit., n 50, 9, 15–7.

[53] G. Howells and S. Weatherill, *Consumer Protection Law* (2nd edn., 2005) 8.

[54] *See* e.g. A. Levitin, 'Bankrupt Politics and the Politics of Bankruptcy' (2011) 97 *Cornell Law Rev.* 1399, at 1404–5; R. Mokal, 'The Authentic Consent Model: Contractarianism, Creditor's Bargain, and Corporate Liquidation' (2001) 21 *Legal Studies* 400, at 401–2.

[55] Jackson, op. cit. , n 2, 253.

[56] Id., 10–4.

[57] *See e.g.* V. Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, 2009) 32–7.

[58] See Insolvency Act 1986, s.285

[59] *See e.g.* Stearns and Zywicki, op. cit., n 51, 13–4.

cooperate in liquidating assets for creditors' benefit. *Pro rata* distribution of the debtor's assets among creditors supports market allocations, "because it mimics the value of [creditors'] expected positions immediately before bankruptcy".[60] By facilitating predictable pro-rata recovery (rather than the unpredictable outcome of case-by-case races-to-court), insolvency law should assist business planning, reduce wasteful creditor competition, and produce more accurate and lower pricing of credit.[61] Ultimately, therefore, the case for maximising returns to creditors rests on the belief that this will allow credit to be most widely available at the lowest cost, and faith that this equates with an efficient allocation of resources.

2. The Fresh Start Policy and Personal Insolvency as Social Insurance

This position rests on assumptions regarding market efficiency, however, which struggle to hold in the face of contemporary conditions in consumer credit markets. The *market failure* rationale justifies personal insolvency's provision to debtors of relief from sub-optimal bargains produced by imperfect consumer credit markets.[62] Information asymmetries between lenders and borrowers and behavioural biases of consumers will systematically produce inefficient credit contracts.[63] The resulting severe costs of over-indebtedness are not just borne by parties to credit transactions but also by third parties, meaning that rather than enforce market allocations, personal insolvency has a role to play in internalising negative externalities. These social costs are multifarious, including for example expense to State social welfare systems in providing for financially troubled households' basic needs.[64] The recognised links between debt and health problems mean that mass over-indebtedness may also burden healthcare systems.[65] The "most powerful driving concerns"[66] of policymakers are wider systemic macro-economic costs of over-indebtedness. Debt problems may reduce employees' economic productivity, pushing debtors from the workforce either by making work uneconomical or through health problems that render employees unfit for work.[67] Similarly, English[68] and EU policymakers[69]

[60] Jackson, op. cit., n 2, 30–1; J. Kilpi, *The Ethics of Bankruptcy* (1998) 14–5.

[61] Jackson, op. cit., n 2, 14–6.

[62] Mian and Sufi, op. cit., n 8, 137–9. Personal insolvency law is not a perfect response to such market problems, as it affects rights of all creditors, not just those engaging in risky practices: W. Whitford, 'The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy' (1994) 68 *Am. Bankruptcy Law J.* 397, at 401, 403. It therefore fits alongside more targeted regulatory measures, both in deterring future inappropriate creditor conduct and in providing often the only practical form of *ex post* consumer redress. *See also* U. Reifner et al, *Overindebtedness in European Consumer Law: Principles from 15 European States* (2010) 50–51.

[63] *See generally* R. Mann, 'Optimizing Consumer Credit Markets and Bankruptcy Policy' (2006) 7 *Theoretical Inquiries in Law* 395; O. Bar-Gill and E. Warren, 'Making Credit Safer' (2008) 157 *University of Pennsylvania Law Rev.* 1; L. Willis, 'Will the Mortgage Market Correct - How Households and Communities Would Fare If Risk Were Priced Well' (2008) 41 *Connecticut Law Rev.* 1177.

[64] Reifner et al, op. cit., n 62, 62.

[65] *See e.g.* S. Emami, 'Consumer Over-Indebtedness And Health Care Costs: How To Approach The Question From A Global Perspective' in *WHO World Health Report*, World Health Organisation (2010); N. Balmer et al, 'Worried Sick: The Experience Of Debt Problems And Their Relationship With Health, Illness And Disability' (2006) 5 *Soc. Policy Soc.* 39

[66] World Bank, *Report on the Treatment of the Insolvency of Natural Persons* (2013) para.77.

[67] id., paras.102–5; Jackson, op. cit., n 2, 244; Hallinan, op. cit., n 6, at 119. Recent empirical research finds better employment and income outcomes for US debtors accessing bankruptcy protection compared to those refused access: Dobbie and Song, op. cit., n 26, at 1792–1797. One UK study finds strong links between

have seen debt relief laws as important facilitators of entrepreneurial productivity, safety nets that facilitate risk-taking necessary for business activity.[70] In contemporary conditions in which consumer demand is essential to economic growth, this logic suggests debt relief laws are equally necessary to restore over-indebted *consumers* to economically productive positions in which they can resume spending.[71] In response to the Great Recession, academic authors and international organisations have increasingly recognised the "debt overhang" problem of household over-indebtedness' disastrous effects on aggregate demand and so on economic growth.[72] The "harshness of debt"[73] inflicts losses of an economic downturn on borrowers (as employment, incomes and home values fall), while leaving creditors untouched with claims to full loan repayment and recourse to security. As borrowers are the members of society with the highest marginal propensity to consume, debt's distribution of losses onto borrowers leads to dramatic falls in consumption, triggering economic downturn. This calls for policies to redistribute losses more evenly, through contractual loss sharing mechanisms and expansive debt relief laws,[74] in order to restore debtors' ability to engage in growth-facilitating consumption.[75]

The Great Recession's lesson that "debt matters" to economic growth and stability,[76] and that the inherent risks of a debt-based economy must be redistributed more efficiently, heightens understanding of personal insolvency law as a form of socio-economic or social insurance.[77] Bankruptcy satisfies economic definitions of insurance, transferring risk from debtors (the insured) to creditors (insurers) through the discharge of debt, with debtors paying a risk-adjusted premium in the form of an interest rate.[78] By discharging consumer debts, the law redistributes costs of over-indebtedness from consumer debtors (and third parties who bear costs where debtors do not self-insure) to institutional creditors, who represent the party better able both to prevent default from occurring (through creditworthiness assessments and underwriting practices) and to bear the costs of default (as discussed further below). This allows social costs of credit markets to be efficiently spread and internalised, and incentivises creditors to reduce the incidence of default and over-indebtedness.

More practically, one could understand bankruptcy as *functionally* acting as social insurance, filling gaps left by the Welfare State.[79] Though the continued vital role of the existing social

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households being in debt and leaving paid employment: E. Kempson et al., *Characteristics of Households in Debt and the Nature of Indebtedness* (2004) 5.

68 The Insolvency Service; Department for Trade and Industry, op. cit., n 40; The Insolvency Service, n 37.

69 European Commission, 'Commission Recommendation of 12.3.2014 on a New Approach to Business Failure and Insolvency' (2014).

70 See also J. Czarnetzky, 'The Individual and Failure: A Theory of the Bankruptcy Discharge' (2000) 32 *Arizona State Law J.l* 393; World Bank op. cit., n 66, 106–10.

71 International Monetary Fund, op. cit., n 15, 1-3, 7–8; Mian and Sufi, op. cit., n 8.

72 Mian and Sufi, op. cit., n 8; Bunn and Rostom, op. cit., n 8; Turner, op. cit., n 7.

73 Mian and Sufi op. cit., n 8, 18–19.

74 International Monetary Fund, op. cit., n 15; World Bank, op. cit., n 66.

75 Mian and Sufi op. cit., n 8, 135–151, 167–87

76 Vlieghe, op. cit., n 9, 2.

77 Hallinan, op. cit., n 6, 98–109; Jackson op. cit., n 2, 229–32; T. Eisenberg, 'Bankruptcy Law in Perspective' (1980) 28 *UCLA Law Rev.* 953, at 981–3; R. Hynes, 'Non-Procrustean Bankruptcy' (2004) *University of Illinois Law Rev.* 301, at 327–31.

78 Feibelman, op. cit., n 1, at 130.

79 *See e.g.* J. Braucher, 'Response to Eric Posner' (2001) 7 *Fordham J. of Corporate & Financial Law* 463, at 466.

welfare system should not be understated, the dramatic rise in household debt of recent decades has corresponded to a period of reduced welfare provision, as well as increased income inequality and stagnation of wage growth for middle and working classes.[80] These trends have involved a substitution of "loans for wages"[81] and official promotion of borrowing as a means of sustaining economic demand[82] and of smoothing consumption in a manner analogous to traditional welfare state provision.[83] Reduced social spending has seen the financialisation of welfare and the increasing role of the market, rather than the State, in addressing citizens' social needs.[84] Evidence from the Great Recession shows households borrowing to counter austerity policies' reduction of social welfare provision,[85] while significant increases in high cost payday lending in the UK[86] illustrate further this substitution of private debt for public debt.[87] Debt is also used to access "essential services no longer provided by the welfare state",[88] including housing and pension provision.[89] Household credit then becomes the "ultimate market-based social welfare programme".[90] This *ex ante* borrowing exposes heavily leveraged households to greater vulnerability *ex post* in the event of an "income shock" or *social force majeure* that typically leads to over-indebtedness – job loss, wage reduction, relationship breakdown, or ill health.[91] These "life accidents" are of the kind against which the welfare state traditionally protects. Privatisation and the State's promotion of market provision in lieu of social spending, transform the State from service provider to regulator,[92] and create a "regulatory welfare state".[93] Regulatory norms and legal protections, such as personal insolvency law, accordingly must provide a "safety net of last resort", when the net of the traditional Welfare State has failed.[94]

These analyses suggest that developments in economic and social policy over past decades, accelerated by recent conditions of recession and austerity, present a clear and urgent policy case for personal insolvency to function as insurance against the risks of excessive debt, both at the individual and aggregate levels. This calls on the law to be expansive in its discharge of debt

[80] P. Lucchino and S. Morelli, *Inequality, Debt and Growth* (2012); J. Wisman, 'Wage Stagnation, Rising Inequality and the Financial Crisis of 2008' (2013) 37 *Cambridge J. of Economics* 921; Turner, op. cit., n 7, 119–124.

[81] A. Barba and M. Pivetti, 'Rising Household Debt: Its Causes and Macroeconomic Implications—a Long-Period Analysis' (2009) 33 *Cambridge J.l of Economics* 113.

[82] C. Crouch, 'Privatised Keynesianism: An Unacknowledged Policy Regime' (2009) 11 *The Brit. J. of Politics & International Relations* 382.

[83] J. Hills, *Good Times, Bad Times: The Welfare Myth of Them and Us* (2014) 49–61.

[84] G. Gloukoviezoff, *Understanding and Combating Financial Exclusion and Overindebtedness in Ireland: A European Perspective* (2011) 44–5.

[85] E. Herden, A. Power and B. Provan, *'Is Welfare Reform Working? Impacts on Working Age Tenants'* (2015) 5–6, 12.

[86] *See* Office of Fair Trading, *Payday Lending: Compliance Review Final Report* (2013).

[87] Barba and Pivetti, op. cit., n 87, at 129–131.

[88] S. Soederberg, *Debtfare States and the Poverty Industry: Money, Discipline and the Surplus Population* (2014) 89.

[89] J. Montgomerie and M. Büdenbender, 'Round the Houses: Homeownership and Failures of Asset-Based Welfare in the United Kingdom' (2015) 20 *New Political Economy* 386.

[90] Sullivan et al., op. cit., n 25, 138.

[91] European Commission et al, *Towards A Common Operational European Definition of Over-Indebtedness* (2008) 23–4.

[92] Ramsay, op. cit., n 22, at 247.

[93] Haber, op. cit., n 17.

[94] id., at 817–819.

and, most relevantly to the subsequent discussion, in the protection offered by its stay of enforcement, "the linchpin of bankruptcy relief".[95]

3. *Objections to Personal Insolvency's Social Insurance Function*

While at least part of the above analysis regarding the economic costs of household over-indebtedness may be widely accepted, two key objections tend to oppose the complete embrace of debt relief and adoption of the law's social insurance function. The first worries that debtors will abuse any system of debt relief, while the second cautions that such a system will raise the costs of, and reduce access to, credit.[96] Both of these are common concerns regarding consumer protection and social insurance measures generally,[97] mirroring the classic reactionary argument that reforms will produce opposite effects to those intended by policymakers.[98] When interrogated, however, these objections do not undermine the case for accepting personal insolvency law's social insurance role.

(a) Moral Hazard

The first argument against household debt relief measures cautions that debtors will abuse generous laws, over-borrowing and subsequently escaping their credit obligations. This raises the issue of *moral hazard*,[99] the risk that the availability of insurance against loss (debt discharge) will reduce the insured's (debtor's) incentives to take steps to prevent default (i.e. borrowing responsibly and striving to overcome financial difficulties).[100] Often overlooked, however, is the fact that moral hazard's original "significance lay not in the recognition that insurance could have undesirable consequences…, but instead in the claim that the undesirable consequences could be controlled."[101] Similarly, personal insolvency systems can use this concept as a guide in designing the law with sufficient safeguards and sanctions "to isolate and exclude debtors who engage in excessively risky or other undesirable credit behaviour."[102] While the social insurance view of bankruptcy sees the availability of debt relief as welfare enhancing, it sees an important need to attach conditions to raise the cost of debt relief (just as insurance policies include deductibles to ensure insured risks are not costless). These include limitations on debtor access (as seen above in relation to the DRO procedure), investigation and potential sanction of culpable debtors, and the debtor's sacrifice to creditors of non-essential income and assets. Thus, the social insurance conception of insolvency retains a role for debt

[95] J. Kilborn, 'Mercy, Rehabilitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy' (2003) 64 *Ohio State Law .* 855, at 893.
[96] *See e.g.* E. Posner, 'Comment on *Means Testing Consumer Bankruptcy* by Jean Braucher' (2001) 7 *Fordham J. of Corporate & Financial Law* 457, at 458–9.
[97] Kilborn, op. cit., n 1, at 595.
[98] A. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (1991) 11. Baker notes that moral hazard is used similarly to caution against "the perverse consequences of well-intentioned efforts to share the burdens of life": T. Baker, 'On the Genealogy of Moral Hazard' (1996) 75 *Texas Law Rev.* 237, at 239.
[99] *See e.g.* Baker id.; Joseph E Stiglitz, 'Risk, Incentives and Insurance: The Pure Theory of Moral Hazard' (1983) 8 *The Geneva Papers on Risk and Insurance - Issues and Practice* 4.
[100] Hallinan, op. cit., n 6, at 84, 92, 103; Hynes, op. cit., n 77, at 329; Feibelman, op. cit., n 1, at 136–7.
[101] Baker, op. cit., n 98, at 240.
[102] World Bank, op. cit., n 66, para.114.

collection, but as a means of guarding against moral hazard, rather than an end in itself. In this light, requiring debtors to undergo a personal insolvency procedure appears more as a solution to, rather than a cause of, moral hazard problems posed by household debt relief policies.[103]

(b) "Lenders should feel able to advance money"

A second perennial objection to introducing debtor friendly law reforms is the claim that they will increase the cost of, and reduce access to, household credit.[104] Examples abound of policymakers, judges and commentators[105] expressing assumptions that laws that maximise returns to creditors, and particularly protect banks, enhance welfare in allowing creditors to supply credit widely at low prices.[106] The belief that it is "important that lenders should feel able to advance money"[107] approaches the status of an article of faith in an English private law alleged to demonstrate an "enduring pro-creditor bias".[108] In the context of the "debt overhang" problem discussed above, typical arguments that the "sky will fall" [109] if creditors' rights are unduly restricted raise a more nuanced question: whether a reduction in supply of cheap household credit would cause greater harm to economic activity than the fall in demand caused by overly leveraged households' declining consumption.

It is precisely this point that contemporary commentators refute when arguing that the severity of the Great Recession indeed resulted from policymakers allowing losses to fall on debtors and "behaving as if the preservation of bank creditor and shareholder value is the only policy goal."[110] Moving from this more general claim to the direct impact of bankruptcy on credit supply, empirical evidence is "surprisingly limited… given the centrality of [this point] to policy debates about bankruptcy reform".[111] Some studies produce ambiguous results,[112] while others find small increases in mortgage prices attributable to differences in bankruptcy laws.[113] Yet more conclude that in modern securitised, diversified credit markets, "the scope of the bankruptcy discharge has very little impact on the price or availability of credit except at the margins."[114] Creditors "can spread, diversify and hedge investments to minimise total portfolio

[103] *See* e.g. Levitin, op. cit., n 10, at 640–647.

[104] J. Goodman and A. Levitin, 'Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates' (2014) 57 *J. of Law and Economics* 139, at 139–142; Taub, op. cit., n 15, 117–118.

[105] For examples of such views among scholars, see e.g. F. McIntyre et al., 'Lawyers Steer Clients Toward Lucrative Filings: Evidence from Consumer Bankruptcies' (2015) 17 *Am. Law and Economics Rev.* 245, at 278, 280; S. Nield, 'Responsible Lending and Borrowing: Whereto Low-Cost Home Ownership' (2010) 30 *Legal Studies* 610.

[106] Mian and Sufi, op cit., n 10, 119–133.

[107] *Royal Bank of Scotland Plc v Etridge (No 2)* [2001] UKHL 44, [2002] 2 A.C. 773, [2], per Lord Nicholls. In this decision, Lord Hobhouse criticised this trend, arguing at [115] that "[t]he law has, in order to accommodate the commercial lenders, adopted a fiction which nullifies the equitable principle [of undue influence] and deprives vulnerable members of the public of the protection which equity gives them."

[108] L. Fox O'Mahoney et al, 'England and Wales', in *Regulating Unfair Banking Practices in Europe: the Case of Personal Suretyships*, eds. A. Colombi Ciacchi & S. Weatherill (2010) 141, at 170.

[109] L. Lupica, 'The Consumer Debt Crisis and the Reinforcement of Class Position' (2008) 40 *Loyola University Chicago Law J.* 557, at 604.

[110] Mian and Sufi, op. cit., n 8, 133, 46–59.

[111] Goodman and Levitin, op. cit., n 104, at 141.

[112] T. Durkin et al, *Consumer Credit and the American Economy* (2014) 613–4.

[113] Goodman and Levitin, op. cit., n 104.

[114] Levitin, op. cit., n 10, 648, at 601–2.

risk" in a manner unavailable to individual debtors,[115] for whom an adverse financial event will most likely be uninsured[116] and can prove catastrophic.[117] Financial creditors are regulated entities, obliged to hold capital reserves designed to protect against such losses. The UK's estimated 8.8 million over-indebted people[118] and the £2.75 billion in non-mortgage debt charged off by lenders annually[119] mean that losses attributable to England and Wales' 80,000 annual personal insolvencies[120] reflect only a small portion of total defaults. These observations suggest that losses to creditors caused by providing greater debt relief in personal insolvency law should reduce lender economic activity (i.e. credit supply) to a lesser extent than the denial of relief will affect over-indebted individuals' behaviour (i.e. consumer spending), particularly bearing in mind debtors' higher marginal propensity to consume. A key insight of insurance theory, that the law can produce efficient outcomes by allocating losses onto the party best placed to bear loss and to prevent relevant risks from occurring,[121] therefore supports debt relief as an efficient transfer of costs onto creditors. A further lesson from the Great Recession is that shifting losses onto *debtors* may in fact reduce credit flows by stifling *demand*, since a two-sided market view shows that boom time borrowers will have little appetite for credit when economic conditions deteriorate.[122]

A more fundamental problem with this typical objection to debt relief is its assumption, foundational to ubiquitous pre-crisis "democratisation of credit" policies,[123] that wide access to cheap credit is necessarily welfare enhancing. The contribution of excessive household debt to the financial crisis, and the effect of the consequent "debt overhang" problem in inducing recession, has led many commentators to doubt this assumption and argue "less finance can be better".[124] This recognition of the need for caution regarding the wide supply of debt at a price concealing its true social costs[125] builds on the pre-crisis emergence of the regulatory principle of responsible lending.[126] Considering these ideas, personal insolvency's role may be precisely to reduce debt flows and ensure that credit markets' costs are internalised through truer pricing, rather than to enforce market bargains blindly. In this way, those outcomes feared by opponents of debt relief should actually benefit the wider economy, while also providing valuable over-indebtedness insurance for which individual debtors may be happy to pay.[127]

[115] Willis, op. cit., n 63, at 1182.

[116] Mian and Sufi, op. cit., n 8, 46–59.

[117] World Bank, op. cit., n 66, para.95.

[118] Money Advice Service, *Indebted Lives: The Complexities of Life in Debt* (2013).

[119] Bank of England, *Bankstats (Monetary & Financial Statistics) - Latest Tables* <http://www.bankofengland.co.uk/statistics/Pages/bankstats/current/default.aspx>.

[120] Insolvency Service, *Insolvency Statistics - October to December 2015 (Q4 2015)* (2016).

[121] World Bank, op. cit., n 66, 94–98; Eisenberg, op. cit., n 83, at 981; R. Posner and A. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 *J. of Legal Studies* 83.

[122] *See e.g.* Bunn and Rostom, op. cit., n 8.

[123] Soederberg, op. cit., n 88, 61–65.

[124] Turner, op. cit., n 7, 17; Mian and Sufi, op. cit., n 8, 127.

[125] Mian and Sufi, op. cit., n 8, 182.

[126] *See e.g.* I. Ramsay, 'From Truth in Lending to Responsible Lending', in *Information Rights and Obligations: The Impact on Party Autonomy and Contractual Fairness*, eds. A. Janssen and G. Howells (2005) 47; K. Fairweather, 'The Development of Responsible Lending in the UK Consumer Credit Regime' in *Consumer Credit, Debt and Investment in Europe*, eds. J. Devenney and M. Kenny (2012) 84.

[127] Goodman and Levitin, op. cit., n 104, at 156–7.

4. *No Commons, Just Tragedy: Maintaining Personal Insolvency's Debt Collection Objective when there is Nothing Left to Collect*

The contemporary conditions of personal insolvency law's operation provide a final, compelling, factor in favour of understanding personal insolvency law as a form of social insurance and of emphasising its debt relief aim. All Debt Relief Order cases and the vast majority of bankruptcies involve consumer debtors (Figure 1) seeking protection by voluntarily initiating proceedings, rather than creditors coercively petitioning for bankruptcy in order to collect debts (Figure 2).[128] In fact, it is precisely those debtors unwilling or unable to make repayments to creditors who use the bankruptcy and DRO procedures. Other options such as the IVA procedure or non-statutory Debt Management Plans (DMPs) are available to debtors able to make part repayments. The steering effects of intermediaries providing these arrangements[129] mean that debtors with saleable assets or available income (to pay both creditors' debts and intermediaries' fees) are less likely to enter bankruptcy. [130] As a result, all DRO debtors and most bankruptcy debtors have few if any non-essential assets available for distribution to creditors (Figure 3).

Irrespective of the theoretical conception of bankruptcy, given that the debtor now usually lacks assets and income for recovery to creditors, the "predominant purpose - if not the sole purpose - of individual bankruptcy today is to effect the discharge of debts - to give the debtor a 'fresh start'".[131] There is simply nothing left to collect in any bankruptcies bar a small unrepresentative minority of high value cases. Personal insolvency law may once have operated alongside corporate insolvency law as a commercial law designed to recover returns to investors from failed business debtors. It now operates, however, as a social welfare law or "law of hardship".[132] Stakeholders working with the law recognise this, with debt charities viewing insolvency mechanisms as a "lifeline"[133] for impoverished clients and part of a "debt solutions landscape",[134] rather than legal or judicial processes.[135] Similarly, in its recent review of this landscape, the Financial Conduct Authority treated "insolvency/statutory solutions" as just one of many wide-ranging "options for dealing with problem debt".[136] The specialist credit regulator positioned bankruptcy at one end of a spectrum of options, many of which are indisputably welfarist in nature, such as "help with budgeting". Viewed in this light, it is easier to see

[128] The split personality of English personal insolvency law means that this small minority of "involuntary" bankruptcies nonetheless remains higher than equivalent rates in jurisdictions such as the USA: J. Kilborn and Adrian Walters, 'Involuntary Bankruptcy As Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job' (2013) 87 *Am. Bankruptcy Law J.* 123, at 124–5.

[129] Financial Conduct Authority, *Quality of Debt Management Advice* (2015).

[130] Approximately 10-20 per cent of bankruptcy debtors have sufficient income to be required to contribute to creditors: Insolvency Service, *Insolvency Statistics: April to June 2016* (28 July 2016).

[131] Kilborn, op. cit., n 95, at 866.

[132] Braucher, op. cit., n 79, at 463.

[133] Christians Against Poverty, *A Guide to the CAP's Official Response to the Insolvency Service's Call for Evidence* (2014) 3.

[134] Money Advice Trust, *Money Advice Trust Consultation Response: Insolvency Service - DROs and the Bankruptcy Petition Limit* (2014) 4.

[135] Contrast with the High Court's view of the DRO procedure as a judicial process in *Howard, R (on the application of) v The Official Receiver* [2013] EWHC 1839 (Admin), [2014] QB 930 (hereafter *"Howard"*).

[136] Financial Conduct Authority, op. cit., n 129, para. 2.13.

"consumer insolvency law [as] a new member of the family of programs (*sic*) designed to deal with the financial dangers of a changing world."[137]

Therefore, both post-crisis theoretical perspectives and the contemporary practice of the law present a strong case for rebalancing personal insolvency law towards its social insurance function, in expanding access to wide-ranging debt relief. The next part of this paper applies these broad ideas to the particular context of the recent Court of Appeal case of *Places for People v Sharples*, and the question it raised of personal insolvency law's protection of debtor tenants from eviction. The paper shows how the ideas jostling for primacy in the preceding pages reappear in the *Sharples* case, though producing a contrasting conclusion.

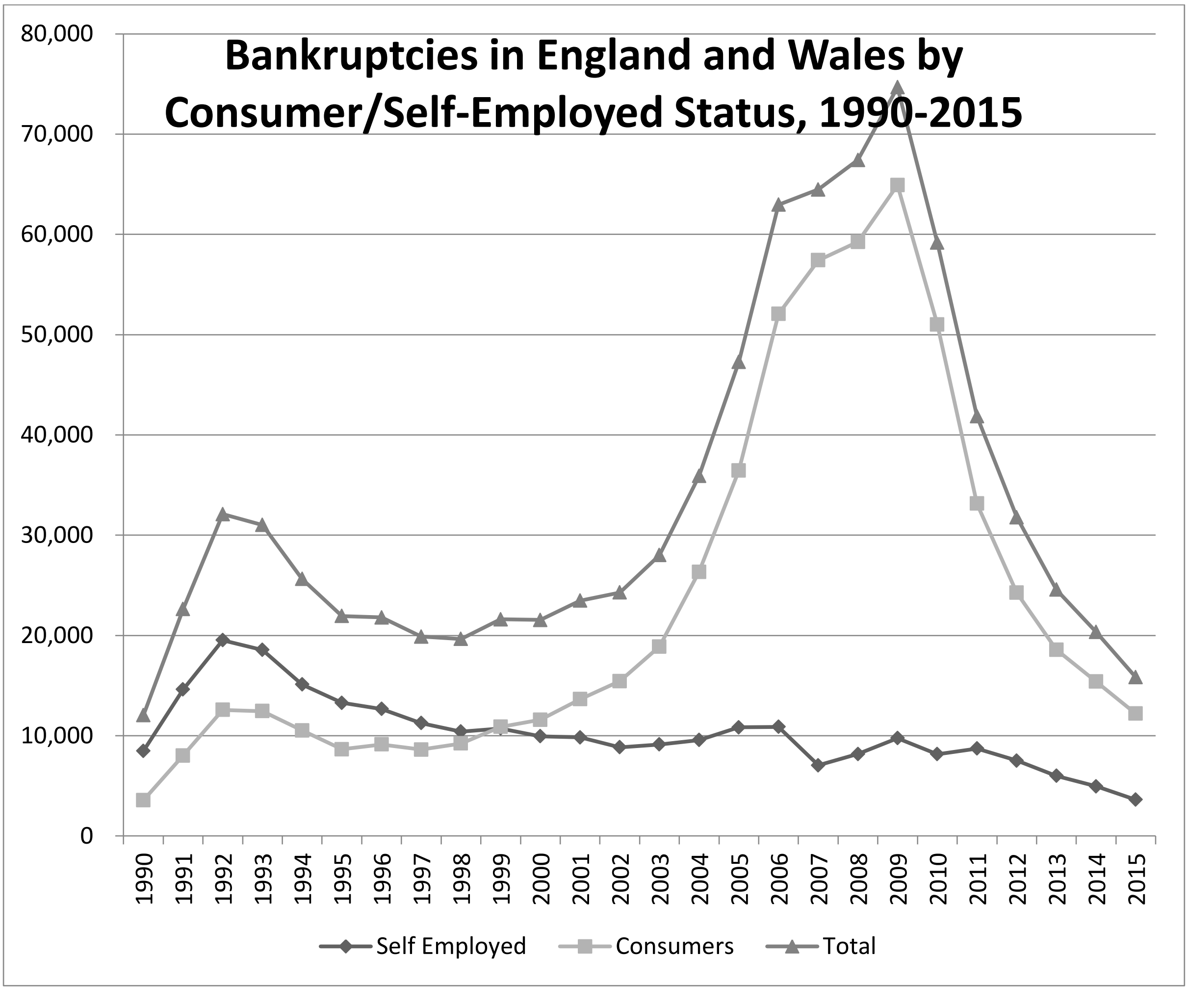

Figure 1: Most bankruptcies involve consumer, rather than business, debt. Source: Insolvency Service.

[137] Kilborn, op. cit., n 1, at 595.

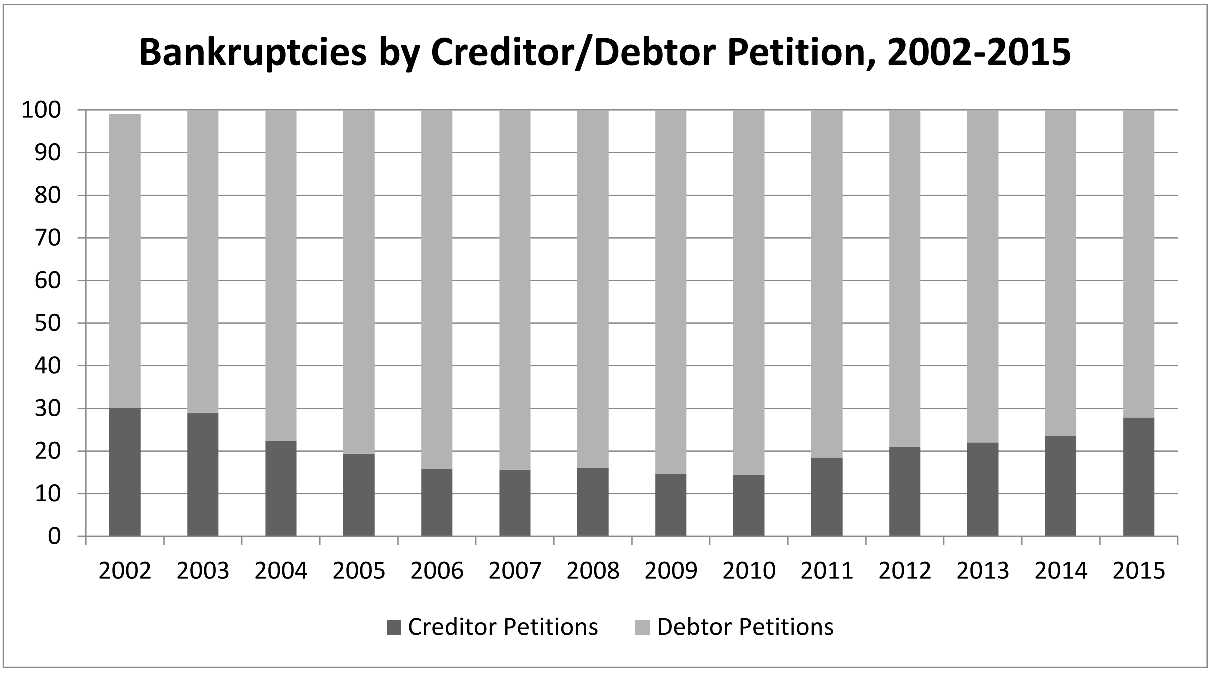

Figure 2: Most bankruptcies are initiated voluntarily by debtors. Source: Insolvency Service.

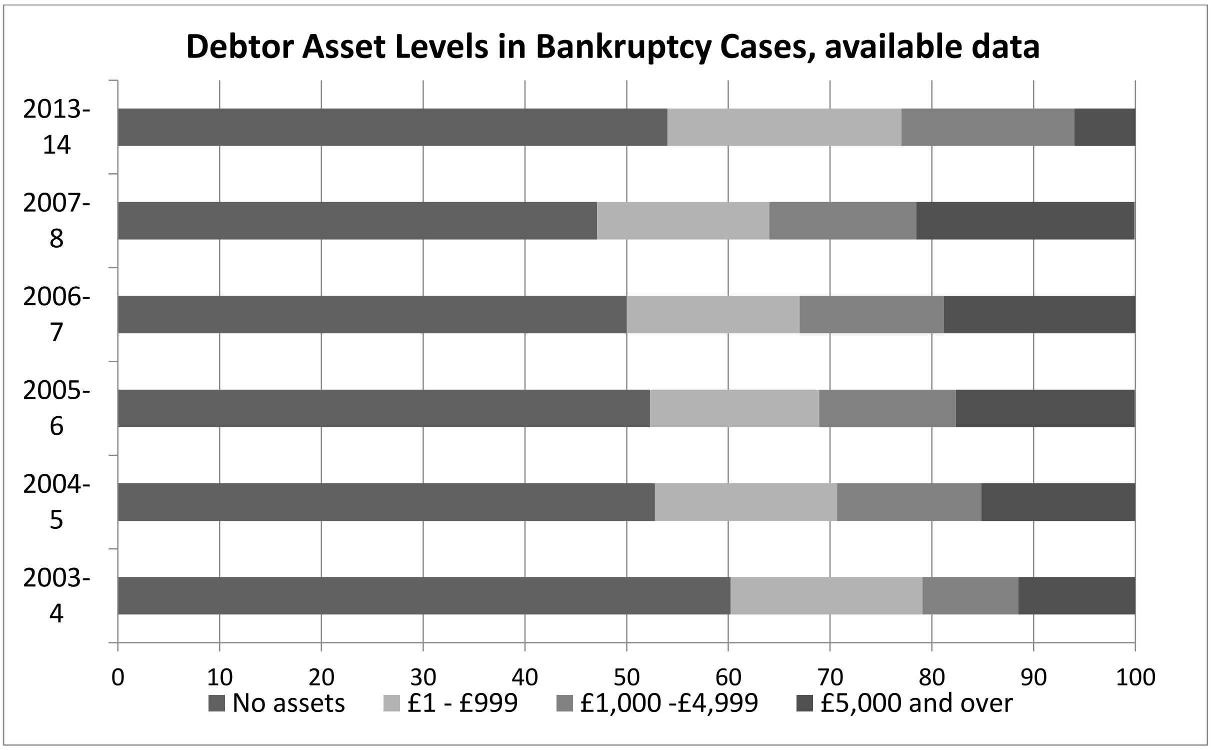

Figure 3: Most debtors entering bankruptcy have few, if any, assets available for liquidation. Source: Insolvency Service.

In *Places for People Homes Ltd. v Sharples*,[138] the Court of Appeal heard joined appeals in two cases where housing associations sought to evict tenants who had fallen behind on rent and sought insolvency protection. The Court answered negatively the central question raised of "whether a bankruptcy order… and a DRO… preclude the making of an order for possession of a dwelling let on an assured tenancy on the ground of rent arrears."[139] The question arose due to uncertainty regarding the scope of insolvency's stay of any creditor's "remedy in respect of a debt",[140] and the effect of a legislative amendment that had exempted the debtor's tenancy from the bankruptcy estate.[141] One can in turn see this uncertainty as more broadly caused by personal insolvency law's ambiguous aims. If the stay of enforcement serves to facilitate the maximisation of creditor recoveries by preserving estate assets for the creditor body, the stay has no reason to prevent an individual creditor from seizing an *exempt* asset such as a tenancy. Alternatively, if the stay serves debt relief aims, it must offer insurance against the debtor's eviction, since any meaningful fresh start requires stable housing. The case thus required the court to make a stark choice between competing conceptions of the law's aims.

1. *Personal Insolvency Law in a Housing Crisis*

In addition to what it says about personal insolvency law more broadly, the case is important in its own right as it relates to the significant contemporary housing problems that have developed during years of austerity, recession and uneven recovery.[142] The case required personal insolvency law to confront the question of its role in responding to this crisis. Rental unaffordability and arrears have grown extraordinarily in recent years,[143] while tenant evictions by County Court bailiffs have increased by over 50 per cent in the years 2010-2015.[144] Counting formal court evictions, however, is likely to "underestimate drastically the prevalence of involuntary displacement among low-income renters".[145] These problems are thus also evident in informal home loss, such as the 2012-13 English Housing Survey finding that almost 18,000

[138] Places For People Homes Ltd. v Sharples; A2 Dominion Homes Ltd. v Godfrey [2011] HLR 45, (hereafter "*Sharples*"). See also Harlow District Council v Hall [2006] EWCA Civ. 156, [2006] 1 WLR 2116.
[139] *Sharples*, id., [5].
[140] See Insolvency Act 1986, ss. 285, 251G(2).
[141] Insolvency Act 1986 (1986 c. 45), s.283(3A), inserted by Housing Act 1988 (c.50), s. 117(1).
[142] *See e.g.* Danny Dorling, *All That Is Solid: The Great Housing Disaster* (2014); J. Hohmann and Just Fair, *Protecting The Right To Housing In England: A Context Of Crisis* (2015). The decision's legal consequences extend to all main forms of tenancy, including the assured shorthold tenancy which is the standard in both social and private sector tenancies: *see e.g.* Insolvency Service, *Insolvency Service Technical Manual, Part 4: Tenancies* (2013), para 30.70, at https://www.insolvencydirect.bis.gov.uk/technicalmanual/. On the assimilation of housing association and private sector tenancies, *see* D. Cowan et al., 'Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights' (2012) 39 *J. of Law and Society* 269, at 283–288.
[143] *See e.g.* StepChange Debt Charity, *Stepchange Debt Charity Statistics Yearbook Personal Debt 2014* (2015) 25; Money Advice Trust, op. cit., n 4, 4, 13–14
[144] Ministry of Justice, *Mortgage and Landlord Possession Statistics Quarterly, England and Wales, October to December 2015* (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499083/mortgage-and-landlord-possession-statistics-october-to-december-2015.pdf>.
[145] M. Desmond and M. Bell, 'Housing, Poverty, and the Law' (2015) 11 *Annual Rev. of Law and Social Science* 15, at 24.

households' last tenancy ended on landlords' request due to non-payment of rent.[146] Statutory homelessness data provides an even starker picture of renters' financial difficulty. While levels of homelessness attributed directly to rent arrears remain low,[147] homelessness arising from the termination of assured shorthold tenancies rose fourfold between 2009-10 and 2014-15 (Figure 4).[148] Again, these statistics understate the problem of homelessness, as current practices among financially constrained local authorities encourage applicants to avail of informal "housing options" over statutory homelessness applications.[149] Alongside housing costs outpacing income growth,[150] commentators look to austerity policies and reduced public housing support as drivers of these problems. Government has reduced housing allowance for private tenants, "capped" overall levels of benefit payments per household, and placed limits on eligible rents for social tenants under the policy colloquially known as the "bedroom tax".[151] One charity concludes that the "weakening [of] the safety net function of the social rented sector" has contributed to the serious rent affordability problem.[152]

The *Sharples* case raised questions as to how personal insolvency law and policy should respond to the challenges of a shrinking social safety net and increased need for debtor protection from housing unaffordability and eviction. Insolvency policymakers have paid surprisingly little attention to this issue, in contrast to the frequent policy consideration of the treatment of a property-owning debtor's home.[153] A 2008 Insolvency Service review conceptualises "the bankrupt's home" solely as a property owned by the debtor and makes no mention of renters.[154] This is despite tenants making up the large majority of debtors entering the personal insolvency system. While data are limited, only 8-14 per cent of bankruptcy debtors during the years 2003-2008 owned homes,[155] and in 2013-14 only 8 per cent of debtors held assets worth more than £5,000.[156] Homeowners are ineligible for the "no income, no asset" DRO procedure. Just as the

[146] Department for Communities and Local Government, *English Housing Survey 2012 To 2013: Household Report* (2014) 85

[147] This is most likely due to procedural advantages for property owners of seeking possession at the (usually short) tenancy's end: *see* s. 21 Housing Act 1988; Shelter, *Eviction Risk Monitor 2012* (2012), 8–9.

[148] Department for Communities and Local Government, 'Statutory Homelessness in England: July to September 2015', <https://www.gov.uk/government/statistics/statutory-homelessness-in-england-july-to-september-2015>.

[149] S. Fitzpatrick et al., *The Homelessness Monitor: England 2015* (2015) vii, x–xi.

[150] S. Clarke et al., *The Housing Headwind: The Impact of Rising Housing Costs on UK Living Standards* (2016).

[151] ibid 21–38. For an official evaluation, see Department for Work and Pensions, *Evaluation of Removal of the Spare Room Subsidy* (2015).

[152] Fitzpatrick et al., op. cit., n 149, viii.

[153] Cork, op. cit., n 19, paras. 1114–1131; Insolvency Service, *The Bankrupt's Home - Before and After the Enterprise Act 2002* (2008); I. Fletcher, op. cit., n 3, para. 8–022. For similarities under Scottish law, see D. McKenzie Skene, 'Forgiving Our Debtors: A Scottish Perspective on a Fresh Start for Debtors' (2005) 14 *International Insolvency Rev.* 1, at 18–19. Much academic and policy discussion during the Great Recession has also tended to focus on *mortgage* debt: *see* works cited at n 15.

[154] Insolvency Service, id.

[155] Insolvency Service, *Profiles Of Bankrupts 2005/6-2007/8* (2009); Insolvency Service, *Profiles Of Bankrupts 2-003/4-2005/6* (2007)

[156] Insolvency Service, op. cit., n 48, 14.

over-indebted population contains disproportionate numbers of renters,[157] personal insolvency very much is a renter's law, though policymaking does not reflect this.[158]

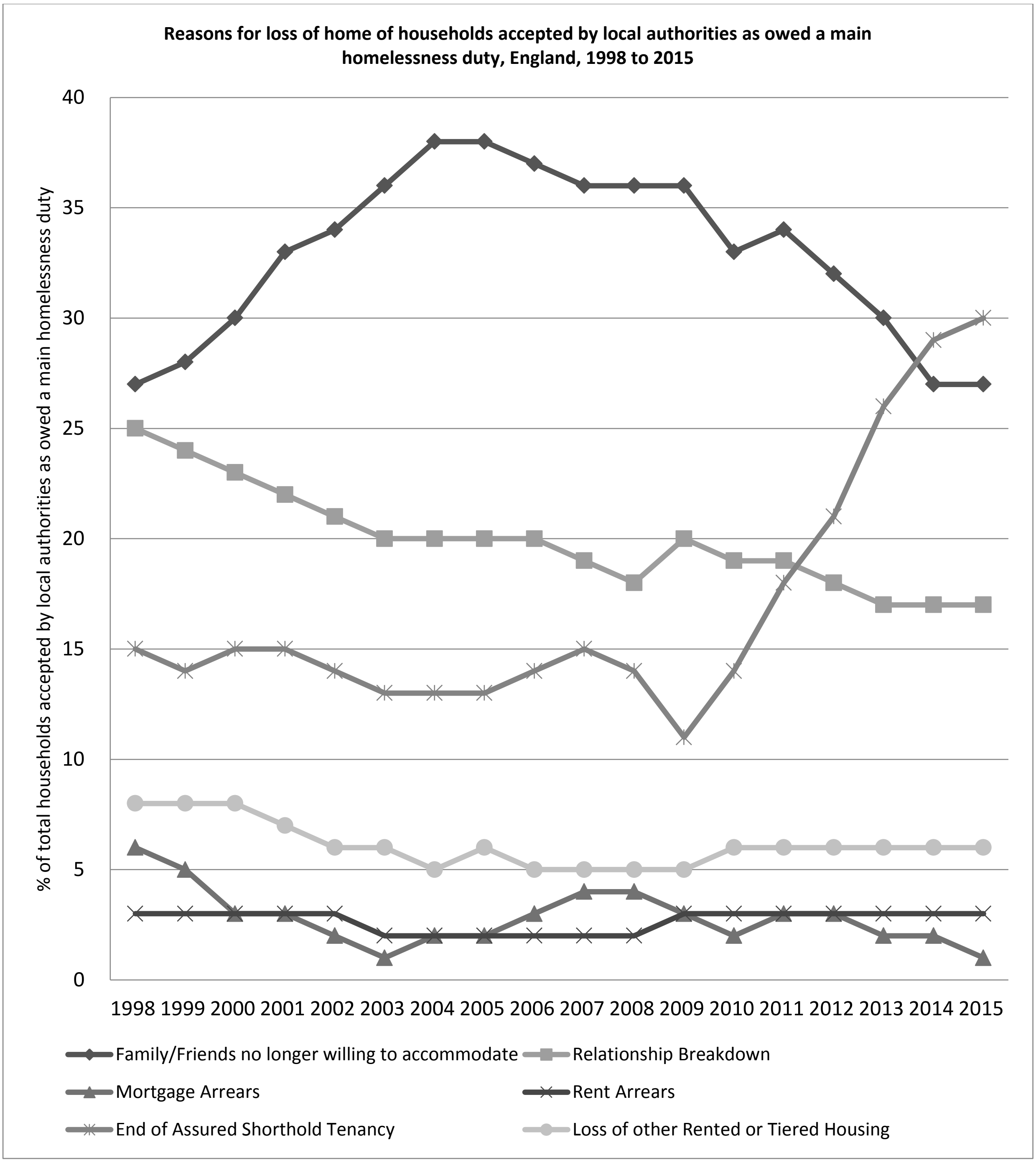

Figure 4: Statutory homelessness related to affordability of private sector rents has risen significantly. Source: Department for Communities and Local Government.

[157] European Commission et al., *Over-Indebtedness: New Evidence from the EU-SILC Special Module* (2010) 38–40.

[158] One exception was legislators' abovementioned intervention through s.117(1) Housing Act 1988 to exempt the debtor's tenancy from the bankruptcy estate, which formed the subject of the *Sharples case*.

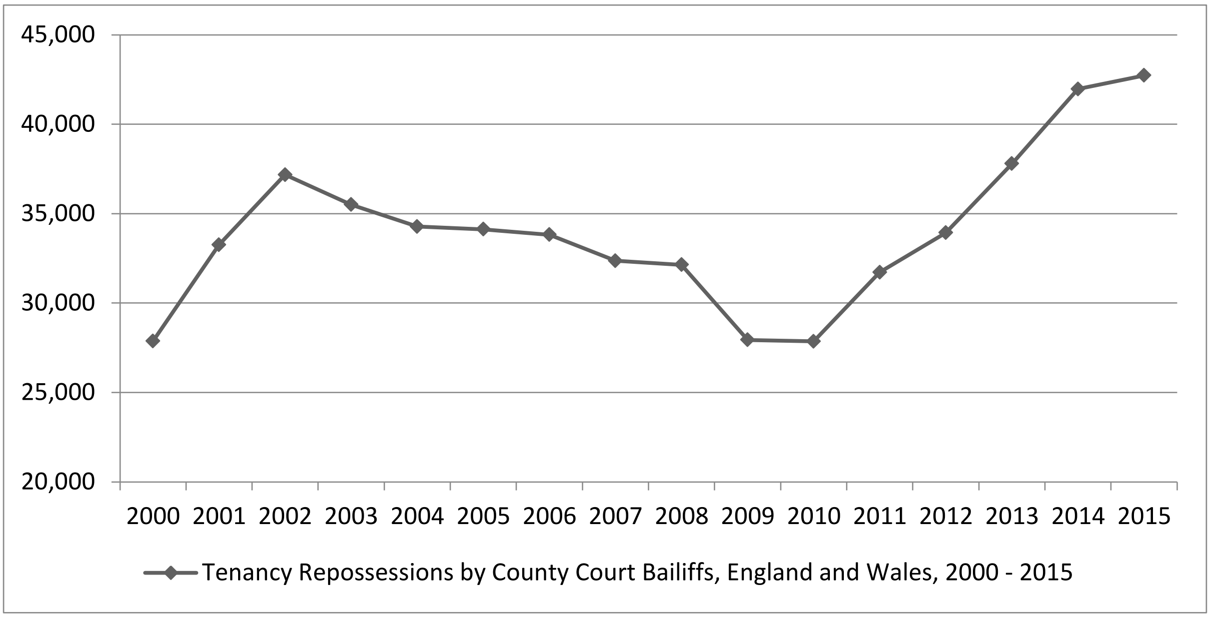

Figure 5: Source: Ministry of Justice

2. *Personal Insolvency Law and the Social Costs of Eviction*

While requiring novel application to the context of rental housing debt, the above justifications for personal insolvency law's social insurance function support a policy case for providing relief to tenants facing eviction. Eviction generates not only considerable hardship for debtors, but also significant social costs justifying public policy responses. Literature identifies links between eviction and health problems,[159] and substantial emotional and psychological costs may accompany eviction.[160] Where the debtor can avoid the more drastic consequences of homelessness, she faces significant transaction costs of relocating to alternative accommodation.[161] These include finding somewhere new to live,[162] transporting belongings and abandoning non-transportable items.[163] Upfront deposit payments and high costs of temporary housing arrangements lead many renters to incur further debt, often at high rates.[164] Investments in social networks may be lost,[165] and eviction may force renters to move to areas of higher poverty and crime rates.[166] An evicted debtor may encounter considerable difficulty in obtaining a new tenancy due to the adverse impact of bankruptcy and an eviction order on the

[159] Desmond and Bell, op. cit., n 145, at 25.

[160] M. Culhane, 'No Forwarding Address', in *Broke: How Debt Bankrupts the Middle Class*, ed. K. Porter (2012) 119, at 129–130.

[161] O. Bar-Gill, 'The Law, Economics and Psychology of Subprime Mortgage Contracts' (2008) 94 *Cornell Law Rev.* 1073, at 1137.

[162] J Clifford et al., *StepChange Debt Charity: Social Impact Evaluation of Certain Projects Using Social Return on Investment* (2014) 89.

[163] Culhane, op. cit., n 160, at 129.

[164] LSE Housing and Communities, op. cit., n 12, ix.

[165] Culhane, op. cit., n 160, 129-130.

[166] Desmond and Bell, op. cit., n 145, 25.

debtor's credit history.[167] The recognition of these costs of eviction "suggests that involuntary displacement is a cause, not simply a condition, of poverty and social suffering".[168] Eviction thus pushes debtors further from the fresh start promised by personal insolvency law and pushes housing market costs onto those least equipped to bear them. This should lead to declining economic participation among affected populations, as just one way in which eviction creates considerable negative externalities. Further social costs include the risk of adverse consequences such as detriment to education and development for children forced to undergo relocation.[169] If multiple evictions strike in a particular area, this may increase stress and health problems among residents,[170] while unoccupied premises also create distinct social costs.[171] Significantly, if the debtor is unable to find alternative accommodation in the private market or social rental sector, a duty may fall on the State under housing legislation to provide accommodation,[172] with data above illustrating how this is an increasing occurrence.

3. *The Decision in Sharples: "the provision of shelter and a 'fresh start' to overburdened debtors"?*[173]

The *Sharples* case therefore decided whether courts should interpret the Housing Act 1988's exemption of a debtor's tenancy from the bankruptcy estate as a policy intervention addressing these externalities and extending personal insolvency's debt relief to protection from eviction. Initially this appears to be the legislative intention behind the reform, as policymakers originally justified it in terms emphasising debtor rehabilitation:

> "… a bankrupt tenant whose tenancy has no financial value is put in an even more unfortunate position if he should lose his tenancy too. If he loses his home, he is not going to be in a position to sort out his affairs..."[174]

The Court of Appeal nonetheless rejected this perspective, holding that the stay of creditor enforcement under the bankruptcy and DRO procedures did not prohibit a court order evicting a debtor for non-payment of rent. Relying on precedent predating the law reforms of the 1980s and 2000s described above,[175] the court found that a possession order made on the ground of rent arrears under an assured tenancy[176] is not a remedy in respect of the debt constituted by

[167] *See e.g.* Citizens Advice Bureau, *Cutting Our Losses: The Need for Good Debt Collection Practice for People with Debt Relief Orders* (2015) 18; Desmond and Bell, op. cit., n 145, at 25.
[168] Desmond and Bell, op. cit., n 145, at 26
[169] Culhane, n 160, at 130–2; The Children's Society and StepChange Debt Charity, *The Debt Trap: Exposing the Impact of Problem Debt on Children* (2014).
[170] Dorling, op. cit., n 142, 252–3.
[171] Bar-Gill. op. cit., n 161, at 1136.
[172] Department for Communities and Local Government, *Homelessness Data: Notes and Definitions* (2015); Clifford et al., n 162, 89–90.
[173] See n 28 above.
[174] HL Deb 11 October 1988 vol 500, 725, per Lord Malcolm Sinclair, Earl of Caithness.
[175] *Ezekiel v Orakpo* [1977] QB 260.
[176] The tenancies were "assured tenancies", in respect of which a court cannot make a possession order except on specified grounds. Some grounds are mandatory, while others are discretionary and allow courts to refrain from making an order where unreasonable. The relevant grounds here were the discretionary ground of rent

the rent arrears. Rather, Etherton LJ stated that such an order "is a remedy which restores to the landlord full propriety rights, including rights of occupation and letting, in respect of the property."[177] The judge rejected the debtors' arguments that the object of a claim for possession is to secure payment of arrears. Instead, he held that such a claim relates to a property right independent of a debt and aims "to restore to the landlord the right to full possession and enjoyment of the landlord's property."[178] Thus under neither the bankruptcy nor DRO procedures do the moratoria on debt remedies prevent an order for possession being made.

Alongside a literal interpretative approach, Etherton LJ also reached the decision by considering the purpose of bankruptcy's stay of enforcement. The judge saw this as the protection of the debtor's estate to prevent one creditor obtaining advantage over another and so to maximise the asset pool available for distribution to the body of creditors.[179] Etherton LJ held that since an assured tenancy does not form part of the bankruptcy estate, this purpose would not be frustrated by allowing a landlord to obtain a possession order, as such order would not disadvantage other creditors.[180] Etherton LJ's view was that where individual enforcement only affects property unavailable to other creditors there is no function for the stay to fulfil. This clearly involves an understanding of the stay of enforcement as serving the sole aim of maximising the assets available for distribution to creditors.

Such logic would not seem to extend to Debt Relief Orders. The DRO is open only to debtors lacking disposable income and assets and so involves "no provision relating to the collection, realisation or distribution of the debtor's estate."[181] The judge nonetheless rejected the idea that this factor necessitated a re-evaluation of the scope of the moratorium. While acknowledging the "broad policy point that the object of a DRO is the relief from debt of those with limited means and limited debts",[182] the judgment abandoned a purposive approach in the DRO context. It instead reverted to a literalist interpretation which would avoid giving "an artificial meaning" to the wording of the relevant legislative provision.[183] The court thus was comfortable adopting a purposive approach when the purpose in question was one of debt collection, but inconsistently was unwilling to allow the debt relief objective determine questions of legislative interpretation. The decision therefore evidences a clear prioritisation of the law's debt collection objective, to the point of marginalising the debt relief aim. This logic overlooks the merits of insolvency law's social insurance function and the public policy case for the law providing a safety net against eviction. Instead, it requires courts to decide the question of whether the law should protect debtors from eviction solely by reference to the purpose of maximising creditor returns.

The second issue decided by the Court was that the status of rent arrears as a bankruptcy debt means that the stays prevent courts from entering judgment for the arrears, as the completion of the insolvency procedure discharges these sums. Similarly, the stays prevent courts from

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arrears and the mandatory ground of eight weeks of unpaid rent. See Housing Act 1988 (1988 c. 50), s.7 and Sch. 2.

[177] *Sharples*, op. cit. n 138, [63].
[178] Id., [65].
[179] Id., [30], [70].
[180] Id., [70].
[181] *Howard,* op. cit., n 135, [61].
[182] *Sharples*, op cit., n 138, [77].
[183] Insolvency Act 1986, s.251G.

making a suspended possession order conditional on arrears repayment (as this would qualify as a remedy in respect of a dischargeable debt). When deciding these issues, Etherton LJ returned to purposive interpretation, noting, "the DRO regime (and bankruptcy) is designed to restrict the recovery of debt and, when the process is complete, to eliminate it".[184] The judge then concluded that permitting debt recovery through a conditional possession order "would be contrary to that policy". This reasoning on first reading appears to interpret expansively the debt discharge under both procedures and to recognise the law's debt relief aim. In effect, however, the judge's prior holding regarding the stay of enforcement frustrates "that policy" and illustrates the difficulty of attempts to balance the law's competing aims by interpreting certain features by reference to one aim, and others by reference to another. Since insolvency protection will not stop eviction, in practice debtors will be denied this recognised statutory right to discharge, as to stave off eviction debtors will need to repay legally dischargeable rent arrears. As noted with regret by a judge following *Sharples*, even a debtor under DRO protection who makes current rent payments may suffer eviction based on a pre-existing conditionally suspended possession order.[185] Advice agencies report that many property owners simply ignore a defaulting tenant's entry into insolvency, or perversely take this event as cause to bring eviction proceedings.[186] Consequently, the accepted practice among debt advisors following *Sharples* is that a debtor must continue to repay rent arrears while under such protection.[187] This practical reality renders ineffective Etherton LJ's conceptual distinction between a remedy in respect of a debt and a remedy to restore landlords' property rights;[188] a distinction that also ignores empirical evidence that housing associations (and, one must equally assume, private landlords) clearly see possession proceedings as a debt collection method.[189] Thus, the *Sharples* decision has effectively created a divergence between law and practice and undermined statutory provisions in obliging debtors in practice to repay arrears where legislation provides for their discharge from such debts. For those debtors lacking the means to pay, personal insolvency law will provide no protection against eviction.

4. *Sharples and the Social Insurance Function of Personal Insolvency Law: Spreading the Risks of a Debt Based Economy*

Despite Etherton LJ's words regarding debt discharge, further comments of the judge seem to acknowledge that the real point at issue was whether insolvency's stay of enforcement prevents eviction. This is evident in Etherton LJ's policy justifications for his decision, which centred on concerns regarding the case's implications for housing providers and other non-defaulting tenants. If insolvency indeed discharges rent arrears, then property owners have already lost these sums and the law imposes no additional costs on them by taking the further step of preventing eviction. In fact, if eviction is avoided property owners might benefit from the rehabilitation of a financially troubled tenant into a debt free occupant, assumedly now better able to keep current on rents. This was far from the view of Etherton LJ, who saw real costs for property owners if unable to evict defaulting tenants, as well as for "non-defaulting tenants who

[184] *Sharples*, op cit., n 138, [81].
[185] *Irwell Valley Housing Association Limited v Docherty* [2012] EWCA Civ 704, [17].
[186] Citizens Advice Bureau, op. cit., n 167, 17.
[187] *See e.g.* ibid 17–18; *Howard*, op. cit., n 135, [9].
[188] *Sharples*, op. cit., n 138, [63].
[189] Cowan et al., op. cit., n 142, at 288, 293–4.

may have to pay higher rents to compensate for the landlord's lost revenue."[190] The judge cautioned that it

> "could be financially catastrophic for [social] landlords to be unable to recover possession from persistent non-payers and could threaten the availability of social housing to meet the great demand from the large number of people who are economically disadvantaged and seek suitable and affordable permanent accommodation."[191]

This reasoning calls into question the legitimacy of household debt relief generally, in a manner epitomising the abovementioned classical objections to consumer and social protection measures.

As well as showing a lack of faith in the possibility of debtor rehabilitation, Etherton LJ's view of the debtor as a "persistent non-payer"[192] suggests an underlying assumption of debtor culpability that raises the "spectre of moral hazard".[193] Concerns of *ex post* moral hazard (that a debtor may exaggerate her need for debt relief) arise in this context since protection against eviction might potentially create incentives for debtors not to make all reasonable efforts to pay rent, a possibility recognised by commentators on the US bankruptcy code.[194] Moral hazard reasoning does not call for a denial of insurance where it could create perverse incentives, however, but rather the structuring of insurance to address such incentives.[195] Thus, eviction moratorium rules in insolvency could alleviate concerns for example by permitting eviction in cases where a debtor is current on all repayments other than rent (suggesting that the debtor was deliberately withholding rent). The law could also permit eviction on grounds other than non-payment of rent, and could learn from amendments to the US Bankruptcy Code that introduced exceptions to the stay on eviction.[196] The law could also treat exceptionally cases in which the rent would be unaffordable even after discharge. *Ex ante* moral hazard concerns of irresponsible borrowing are less significant in the context of rented properties than for other consumer borrowing, however. Housing is a necessity, rather than a luxury purchase made by a "spendthrift" debtor.[197] Therefore, moral hazard concerns and the problem of potential "persistent non-payment" do not appear to justify the outcome in *Sharples*.

In respect of Etherton LJ's second classic policy objection that protecting insolvent tenants from eviction would increase costs for property owners and subsequently for non-defaulting tenants, the social insurance function of bankruptcy sees this as an outcome to be pursued rather than a "catastrophe". It seeks to spread the costs of a debt-based economy more widely in order to address externalities and in particular debt overhang problems that result from the market

[190] *Sharples*, op. cit., n 138, [5].
[191] Id., [71].
[192] Here contrasted with the "economically disadvantaged", much like historical distinctions between the "industrious poor" and the "undeserving poor": *see* D. Graeber, *Debt : The First 5,000 Years* (2012) 388–9.
[193] World Bank, op. cit., n 66, para.114.
[194] Warren, op. cit., n 28, at 502–3; A. Ahart, 'Inefficacy of the New Eviction Exceptions to the Automatic Stay, The' (2006) 80 *Am. Bankruptcy Law J.* 125, at 126–7.
[195] World Bank, op. cit., n 66, para.114
[196] 11 U.S.C. §362(b)(22), (23); Ahart, op. cit., n 194. These exceptions permit eviction where an eviction order predates the bankruptcy petition; where the property is endangered; or where illegal use of controlled substances is taking place therein.
[197] L. LoPucki, 'Common Sense Consumer Bankruptcy' (1997) 71 *Am. Bankruptcy Law J.* 461, at 462-4.

allocation of losses onto those least able to bear them. Insurance theory would reallocate these losses onto housing associations and holders of property portfolios, given they are better placed than debtors (and third parties) both to bear these costs and to prevent them from arising.[198] Property owners, like all lenders, spread and hedge losses, and include default losses in calculating rents charged across their range of tenants. While this process is difficult for smaller owners, those engaging in the commercial activity of renting property for profit must bear accompanying risks and price them accordingly, as traders who do not understand their businesses have no right to remain artificially in the market.[199] Landlords may be less equipped than financial institutions to prevent default through informed credit extension practices. They nonetheless benefit from access to credit reference systems and remain much better placed than individual renters to conduct complex risk assessments regarding tenants' future likelihood of defaulting. Personal insolvency commentators suggest that special considerations might apply to non-profit social landlords of the type at interest in *Sharples,*[200] and indeed Etherton LJ's judgment emphasises how these property owners' tenancies serve not commercial objectives but a "special social need".[201] Nonetheless one must recognise that the shift of social housing provision from local authorities to housing associations was motivated by politicians' deliberate choice to instigate a "business ethos" in this sector, and accordingly to treat housing associations similarly to private landlords.[202] Housing associations practice such commercial risk management techniques as conducting affordability assessments before letting.[203] This is particularly the case given the increasing consolidation of the sector into a small number of very large providers, since "the bigger the organisation, the more it can insulate itself from external risks."[204] Furthermore, recent legislative changes have authorised social landlords to charge rents closer to market rates, while some larger associations are "moving their focus away from housing those in greatest need towards a more diversified tenant base".[205] As housing associations act more like commercial operators, justifications grow for treating them as such in personal insolvency law. Undoubtedly, particularly thorny policy issues arise at this "interface between legislation governing the provision of… [social] accommodation… and insolvency legislation".[206] It is clear nonetheless that the social insurance model of bankruptcy, and its strong argument in favour of eviction protection, should feature in any policy assessment.

Regarding the passing of these property owner costs onto non-defaulting tenants, again bankruptcy's social insurance function seeks precisely this outcome. The payment of an increased premium (in higher rents) should reduce externalities in producing a truer cost of credit/housing, while also offering tenants insurance against the risk of over-indebtedness and eviction that faces all renters in volatile economic conditions. Etherton LJ's words hint that the law's provision of increased eviction protection would not only raise rents, but also lead property owners to "ration" tenancies and refuse to rent to certain groups perceived to be at

[198] See n 121.
[199] Howard, op. cit., n 29, at 1064. This is particularly so since "massive" Government subsidies support the private rental market: Dorling, op. cit., n 142, 8.
[200] D. Milman, 'Debt Relief Orders: Mixed Messages From The Courts And Policymakers' (2012) 25 *Insolvency Intelligence* 104, at 105–6
[201] *Sharples*. op. cit., n 138, [71].
[202] Cowan et al., op. cit., n 142, at 282–286.
[203] Department for Work and Pensions, op. cit., n 151, 20, 67.
[204] Cowan et al., op. cit., n 142, at 285.
[205] Fitzpatrick et al., op. cit., n 149, xv.
[206] Sharples, op. cit., n 138, [5].

high risk of future insolvency. One must note, however, that landlords already carry out credit history checks to screen prospective tenants, reducing access considerably.[207] Further, if this warning rings true and markets can affordably provide only insecure housing devoid of insurance against economically and socially harmful eviction, then this suggests that law and policy should revisit openly the balance between public and market provision. The current equilibrium, with public provision increasingly replaced by reliance on ensuring market access, has created a necessary new social policy role for law and regulation in allowing citizens to retain "basic… services even when they can no longer afford them through the market."[208] Policymakers have recognised this in their support of defaulting mortgage debtors following the financial crisis,[209] but it is also time for the law to consider in the rental context the appropriate balance between ensuring freedom to access housing and freedom to maintain housing.[210]

CONCLUSION

The decision in *Sharples* exemplifies reasoning common in judicial[211] and policy decision-making in the field of personal insolvency, characterised by an unwillingness to embrace wholly the fresh start policy. Accordingly, the law offers only 'adulterated debt relief',[212] conditioned by the persistent view that it should primarily serve the interests of creditors. A consequence of the law choosing contract enforcement as the predominant regulatory approach[213] is its inability to respond to contemporary challenges and to fulfil its potential to produce positive policy outcomes. This article does not argue that insolvency law is an ideal remedy for social problems better addressed by the welfare system. The law nonetheless must recognise the practical and policy context in which it operates, and its *de facto* role of last resort insurer against debt crises at both the micro and macro levels. In an important article in the then-nascent consumer bankruptcy literature, Niemi asked whether personal insolvency law should aim to cure a market failure or a social problem.[214] In an increasingly financialised world, it appears ever more difficult to draw such a boundary between the market and the social. Private consumer credit and housing markets increasingly replace public provision, but failures in these markets trigger significant social problems for troubled households, while the resultant distribution of losses also generates negative aggregate economic effects.[215] Contemporary scholarship advances a strong policy case for understanding personal insolvency law as a form of social insurance, a means of distributing more equitably and efficiently the risks inherent in a debt-based economy. This calls for recognition of the law's provision of wide-ranging debt relief

[207] See n 167, n 202.
[208] Haber, op. cit., n 17, at 807.
[209] Id., 810–13; I. Ramsay, 'Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU' in *Consumer Debt and Social Exclusion*, eds. H. Micklitz and I. Domurath (2015), 189 at 204–12.
[210] M. Desmond et al., 'Evicting Children' (2013) 92 *Social Forces* 303.
[211] See also *Regina (Balding) v SS Work and Pensions* [2007] EWCA Civ 1327, [2008] 1 WLR 564; *Regina (Cooper and Payne) v SS Work and Pensions* [2011] UKSC 60, [2012] 2 WLR 1.
[212] See n 45 above.
[213] I. Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford J. of Legal Studies* 177, at 197.
[214] Niemi-Kiesilainen, op. cit., n 1.
[215] Mian and Sufi, op. cit., n 8; Turner, op. cit., n 7.

as its primary objective, to be emphasised over an alternative aim of attempting to produce maximum returns to creditors from what is often a debtor's meagre income and assets. Opposition to this approach is rooted in concerns of moral hazard and fears of reducing credit supply, as evidenced in Etherton LJ's reasoning in *Sharples*. Analysis of the Global Financial Crisis and Great Recession, however, illustrates the limited control individuals hold over the dynamics of credit and demonstrates the great risks of excessive debt flows. [216] As household debt creeps again towards pre-crisis levels,[217] and austerity policies require citizens to turn ever more to markets for basic needs, it seems an apt time to reimagine the role of personal insolvency law as an insurer of last resort against the contemporary risks of our debt-burdened society.

[216] *See e.g.* Turner, op. cit., n 7; R. Rajan, *Fault Lines: How Hidden Fractures Still Threaten the World Economy* (2011).
[217] Office for Budget Responsibility, *Economic and Fiscal Outlook* (2016) 70.